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JOSEPH F. SPANIOL, JR.
CLERK

No. 86-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, a Public Body Corporate,
Petitioner,

v.

ROBERT L. DOWELL, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

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Riddick v. *School Board of City of Norfolk*, 784 F.2d 521 (4th Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 3811 (May 29, 1986) (No. 85-1962) 1, 2, 3, 4

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In the petition for certiorari, we sought review of the Tenth Circuit's holding that a finding that a school system had achieved a unitary status did not eliminate the school's obligation to continue a court-ordered mandatory busing plan. As we explained, the Tenth Circuit's decision conflicts with a decision of the Fourth Circuit, *Riddick* v. *School Board of City of Norfolk*, 784 F.2d 521 (1986), *petition for cert. filed*, 54 U.S.L.W. 3811 (May 29, 1986) (No. 85-1962). Respondents' opposition warrants a brief reply.

1. Respondents argue primarily that there is a dispositive procedural ruling by the court of appeals which will preclude this Court from reviewing the issues presented in the Petition. Petitioner is at a complete loss to understand what independent procedural issue respondents believe is dispositive. Petitioner is seeking review of the Tenth Circuit's holding that the "unitariness" finding by the district court in 1977 had no effect on the 1972 district court order mandating student busing to achieve an integrated school system. That issue is squarely presented in this case. The holding below was that the court of appeals could "see no reason why this case should be treated differently from any other case in which the beneficiary of a mandatory injunction seeks enforcement of the relief previously accorded by the court." Pet. App. 9a. In so holding, the court recognized that the Fourth Circuit in *Riddick* had held that a previous finding of unitariness supplied a reason to hold that the mandatory busing order was dissolved, even without a specific order. Pet. App. 8a n.3.

It is completely misleading for respondents to argue that petitioner failed to challenge the holding below that "the district court erred in denying the motion to reopen the suit." Br. in Opp. 17. The decision of the court of appeals was that the motion to reopen should have been granted *because* petitioner had a continuing duty to obtain court approval before modifying the busing plan which it had not done. Pet. App. 13a. Thus, by challenging the holding that the 1972 injunction remains in effect, petitioner is necessarily challenging the sole basis for the "procedural" holding reversing the district court's denial of the motion to reopen.

Perhaps the point can be best demonstrated by comparing the outcome of this case with what would have happened if this case had arisen in the Fourth Circuit. In that circuit the district court's denial of the motion to reopen would have been reviewed solely on the basis of whether the district court abused its discretion in

finding that respondents had failed to carry their burden to show that the new busing plan was intentionally segregative. This is because in the Fourth Circuit there would have been no violation of the underlying busing decree because it was dissolved with the unitariness finding. In the Tenth Circuit, by contrast, the appellate court reversed solely because of petitioner's violation of the 1972 decree. Thus, the procedural issue is completely derivative of the legal issue which divides the circuits and which is squarely presented in both this case and *Riddick*.

2. Respondents' submission in this case is quite startling in light of the claim by the petitioners in *Riddick*, who are represented by the same counsel of record, that the *Riddick* case should be reviewed by this Court because it conflicts with the decision in this case. See Petitioners' Supplemental Brief at 7-11, *Riddick* v. *School Board of City of Norfolk*, No. 85-1962 (explaining at length the conflict in the circuits without any mention of procedural differences).

In the petition, we explained why the Court should hear both cases. Pet. 13-14. Respondents assert that "[i]t is certainly far from clear that the Court's consideration . . . will be materially assisted by having 'briefs and arguments of two sets of counsel.'" Br. in Opp. 25. They do not dispute, however, that there is a significant factual difference in the two cases concerning why the school boards decided to modify their respective busing plans.[1] The Court certainly might benefit from reviewing the issue as it arises in differing circumstances.[2]

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[1] Respondents attack (Br. in Opp. 35-39) the district court's findings that the newly instituted plan did not resegregate the schools in a way that would warrant reopening the case. But that issue is clearly not before this Court. If the Court holds that the district court correctly held that the unitariness finding required that a fresh constitutional violation must be shown, then the respondents must satisfy the strict standards for reopening the case under Rule 60(b).

[2] We respond to footnote 23 only because of the inference that respondents asked the Court to draw from it concerning the re-

For the reasons stated above and those presented in the petition, the petition in this case should be granted and the case should be heard in tandem with *Riddick*.

Respectfully submitted,

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liability of petitioner's counsel. The only error revealed by that footnote is the citation to "T. 32" which should have read "T. 325". We apologize for that error, but submit that it is hardly a sufficient basis for suggesting that "a brief on the merits from this petitioner would have to be scrutinized with extra caution." Br. in Opp. 26-28.